

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

CLIFTON R. WHARTON, JR., ex-Chancellor of the State University of New York, individually and in his official capacity; JOHN MARBURGER, President of the State University of New York at Stony Brook, individually and in his official capacity; HOMER NEAL, Provost of the State University of New York at Stony Brook, individually and in his official capacity; ROBERT NEVILLE, Dean of Humanities and Fine Arts at the State University of New York at Stony Brook, individually and in his official capacity,

Petitioners,

—against—

PROFESSOR ERNEST F. DUBE,

Respondent.

BRIEF IN OPPOSITION

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**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

Preliminary Statement

Thirty-three years ago, Justice Felix
Frankfurter wrote a dissenting opinion in a

consolidated set of cases which has, over time, worked itself into the annals of this Courts's jurisprudence concerning the grant of certiorari. Frankfurter argued that "this Court should not be reviewing decisions in which the sole issue is the sufficiency of the evidence for submission to a jury." See, Rogers v. Missouri Pacific Railroad Co., Webb v. Illinois Central Railroad Co., Herdman v. Pennsylvania Railroad Co., Ferguson v. Moore-McCormack Lines, 352 U.S. 518, 525 (1957). Agreeing with Justice Frankfurter, Professor Henry Hart considered the grant of certiorari to decide such issues as "a grievous frittering away of the judicial resources of a nation." See, Hart, Forward: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 98 (1959).

The Petition for Certiorari, (hereinafter, "Petition") filed in this case is an artfully drafted request to have

this Court review whether respondent submitted sufficient evidence to entitle him to a jury trial. At pp. 28-30 the Petition explicitly states that respondent's evidence "was [not] sufficient to establish a violation of Dube's constitutional rights . . . " See also "Questions Presented" at 2. This Court has held repeatedly, however, that "we do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); Texas v. Mead, 465 U.S. 1041, 1043 (1984) (Stevens, J.).

Petitioners characterize this attempt to seek a review of respondent's evidence below as reflective of a "split among the circuits concerning what standard should be applied when public officials move for summary judgment as to their entitlement to qualified immunity concerning motive based claims." Petition at 23-24.

The Petition, however, does not describe any "split" or "conflict" in the circuits, but rather agreement and lack of clarity.¹ Petitioner's assert that "it is clear from the Second Circuit's decision in this case that that court did not apply Martin's direct evidence test or any other type of heightened standard to respondent's showing, or in any way limit the inferences respondent sought to draw." Pet. at 23. However, this assertion is entitled to little weight since the Second Circuit relied on decisions of this Court and a 900 page record, and obviously felt that, whatever the standard was that had to be

¹Even if a conflict existed, that is hardly sufficient grounds for certiorari to be granted. In a study published in 1975, it was demonstrated that in the 1971 and 1972 Terms of Court, certiorari was denied in 60-65 cases each term despite the existence of a "direct conflict" in all of those cases. See, Feeney, Conflicts Involving Federal Law: A Review of Cases Presented to the Supreme Court, 67 F.R.D. 301, 320 (1975).

met, respondent's proffered evidence was sufficient to entitle him to a jury trial on his First Amendment claims. Pet. at 23a-28a. Petitioners' claim that the Second Circuit did not so hold is no more than a transparent attempt to have this court review the decision of that court to see whether the evidence before it was sufficient to entitle respondent Dube to take his claims to a jury.²

Below, after a brief recital of the facts, respondent shows that the evidence before the Second Circuit was more than sufficient to entitle him to a jury trial of his claims.

²This case is therefore quite different than Siegert v. Gilley, 895 F. 2d 797 (D.C. Cir. 1990) cert. granted, 59 LW 3288, (U.S. October 16, 1990), in which the D.C. Circuit ordered the dismissal of plaintiff's case at the pleading stage without allowance for limited discovery on the issue of unconstitutional motive.

STATEMENT OF THE CASE

Respondent Ernest F. Dube is a native of South Africa. Before coming to the United States, he obtained a diploma from the Hofmyer School of Social Work in Johannesburg, South Africa in 1953, and a B.S. degree in Psychology and Sociology from the University of Natal in Devon, South Africa. (Appendix submitted to the Court of Appeals ("A") at 650-651).

In 1967, respondent was expelled from South Africa.³ He came to the United States and studied cognitive psychology at Cornell University. He was awarded his Ph.D. in that field in 1976, and joined the faculty of the State University of New York at Stony

³Respondent was arrested by the South African government in 1963 for his outspoken opposition to apartheid. He was imprisoned for four years on Robben Island, the notorious prison where South Africa holds political prisoners, and was released only on condition that he leave South Africa.

Brook (hereinafter, "S.U.N.Y.") in 1977.
(Id.)

In the spring of 1983, Dube taught a course at Stony Brook called "The Politics of Race." Respondent had taught this course since the fall of 1981. (A. 300-301). The course was designed to analyze what respondent describes as the "three main forms of racism: overt racism, covert racism, and reactive racism." (A. 356).

A visiting professor at Stony Brook, Selwyn Troen, accused respondent Dube of using this course to propagate an equation between Zionism and racism. Professor Troen made this accusation in a letter which he disseminated to newspapers and to a number of SUNY-Stony Brook administrators and faculty members. (A. 23).

Dean Egon Neuberger referred the letter to the Executive Committee of the Faculty Senate, which made a unanimous determination

that Dr. Dube's handling of the subject of Zionism had been consistent with academic freedom and academic responsibility. (A. 49). The full faculty senate later adopted this finding at a plenary session. (A. 50).

Petitioner Provost Homer Neal issued a statement during the summer which adopted the Senate Executive Committee's position as the University's. (A. 40). This position was in turn adopted by petitioner President Marburger, who issued a statement intended to be the University's final word on the subject. (A. 619; 723).

However, the University administration was quickly made aware that the matter would not be allowed to rest there. Local and national Jewish organizations including the Anti-Defamation League, (hereinafter, "A.D.L."), began to raise a clamor of protest against what was characterized as anti-Semitism on the part of Dr. Dube. (A.

703-722; 892-897). An extremist group, the Jewish Defense Organization, passed out leaflets on the Stony Brook campus demanding that respondent Dube be fired "or else," and threatened colleagues of respondent Dube with physical violence. (A.53). The S.U.N.Y. central administration and the Stony Brook administration received letters from state legislators, from alumni, and from business leaders on Long Island demanding that the University deal with Professor Dube's teachings. (Id.) The question of funding for Stony Brook was explicitly counterposed to the continuing tolerance of Professor Dube's course by at least one legislator. (A. 620-626). On August 31, 1983, Governor Mario Cuomo issued a statement which castigated the Stony Brook faculty and administration for their silence in the presence of anti-semitic teachings. (A. 50). Respondent Dube's wife lost her

job, his home was burglarized, and fearing for the safety of his children, he left his home on Long Island for New York City. (A. 654).

Despite Professor Dube's earnest and repeated denials that he did not endorse the position attributed to him in the news media (A. 699, 53), and his decision to alter the syllabus for the course as a result of the controversy (compare, A. 358 with A. 343-350), there was continuous agitation by those seeking to have the University take action against him.

On October 19, 1983 petitioner Marburger, after having issued a statement exonerating respondent Dube of violating academic freedom, met with representatives of twenty-one Long Island and national Jewish organizations. (A. 52). Following that meeting, petitioner Marburger issued a statement which divorced the University from

the contents of Professor Dube's teachings.
(A. 45).

During the fall and winter of 1983 and the following spring, the A.D.L. and other organizations made clear to university officials that their handling of the Dube controversy was still under scrutiny. (A. 779, 780). In April, 1984, university officials from the central administration and the Stony Brook campus met in New York City. That meeting resulted in a joint statement issued by petitioner Marburger and Rabbi Arthur Seltzer of the A.D.L., and in an agreement by the A.D.L. to keep the lowest possible profile from that point on while the university took care of the problem posed by Dr. Dube's teaching. (A. 772-774; 763e-763h).

In 1985, when Professor Dube was considered for tenure, the ad hoc interdepartmental committee (which

functioned as the equivalent of a departmental committee) recommended him for tenure and promotion and expressed "unanimous agreement that Professor Dube not be lost to Stony Brook." (A. 228). The personnel policy committee recommended him for tenure without promotion, with the majority concluding similarly that "the university would be intellectually poorer without Professor Dube's continuing contributions." (A. 231).

Petitioners Neville and Neal recommended against tenure for Professor Dube. Based on the Neal and Neville recommendations, Petitioner Marburger, the chief focus of the attack on Professor Dube, also decided to deny tenure. (A. 250-255; 265; 259).

Pursuant to the United University Professionals agreement with the State University, Professor Dube was entitled to review of the Stony Brook administration's

decision by a tripartite committee, which would report to the Chancellor, petitioner Clifton Wharton. (A. 646-649). The committee, after reviewing Dr. Dube's qualifications, recommended unanimously that he be granted tenure. (A. 650).

Petitioner Wharton declined to take any action on the committee's recommendation, ostensibly because the American Association of University Professors had urged him to grant tenure to Dr. Dube, and thus compromised the procedure. (A. 701).

A second committee was formed at petitioner Wharton's direction, which also recommended that Dr. Dube receive tenure, or alternatively, that he be given a further opportunity to publish during a three year extension of his contract. (A. 664).

On January 30, 1987, petitioner Wharton rejected these recommendations and informed Dube by letter that he would not be given a

tenured position at Stony Brook, but held out the possibility that respondent could obtain a teaching position elsewhere in the S.U.N.Y. system. In his letter, Petitioner Wharton expressed his concern that if he were to grant Professor Dube tenure at Stony Brook, "your critics will claim that it represents a reaffirmation of the content of your teaching and your advocates will claim a victory against racial/religious bigotry and for the content of your teaching." (A. 672).

On March 9, 1987, in a letter to the President of the American Association of University Professors, Jerome Komisar, then acting Chancellor, declined to reconsider the determination made by petitioner Wharton, claiming that it had been based on the tenure criteria by the S.U.N.Y. Board of Trustees. (A. 791).

Respondent Dube instituted this suit in May of 1987. After some discovery, petitioners filed a motion for summary judgment and judgment on the pleadings in October of that year. In May of 1988, Judge Wexler, to whom this case was initially assigned, granted respondent Dube's motion for recusal. The case was then transferred to Judge Mishler, who denied petitioners' motion in October, 1988. Petitioners filed a notice of appeal in November 1988, and the 2d Circuit opinion affirming Judge Mishler was issued on April 12, 1990. Rehearing was denied on June 15, 1990.

REASONS FOR DENYING THE WRIT

The U. S. Court of Appeals for the 2d Cir. concluded after review of the 900 page record in this matter that "Dube has proffered evidence from which a jury could find that petitioners denied tenure and promotion to him in response to pressure

exerted by government officials and community activists outraged by his teachings." Petition for Certiorari at 25a. The evidence relied upon by the Court of Appeals included the following facts:

In his January 30, 1987 letter to respondent conveying the final decision denying tenure, petitioner Wharton wrote: "[i]f a positive tenure decision is made, your critics will claim that it represents a reaffirmation of the content of your teaching and your advocates will claim a victory against racial/religious bigotry and for the content of your teaching." (A. 672).

After the first Chancellor's review committee unanimously recommended tenure for Professor Dube, petitioner Wharton took the unprecedented step of dissolving the committee without acting on its recommendation. (A. 701). Petitioner

Wharton's action was in clear violation of Article 33 of the S.U.N.Y. contract with the Union of University Professionals. (A. 645-649). Petitioner Wharton's most important reason for dissolving the review committee, without acting on its findings, was the fact that he received a letter from a "rival bargaining unit" while respondent's case was under consideration. However, the American Association of University Professors, the organization in question, was in fact an organization with a long tradition of expressing interest in affairs affecting academic freedom and not merely a bargaining unit, and this fact was pointed out to petitioner Wharton by petitioner Marburger. (A. 216).

Petitioner Wharton announced that the first advisory committee was compromised by the release to the press of its recommendation and that he was forming a new

committee. He took this unusual position shortly after a letter was sent from the Long Island Region of the A.D.L. urging that he do so. (A. 722). The A.D.L. had played a leading role in bringing pressure on the university in 1983 to censure Professor Dube. Petitioner Wharton also took the unprecedented step of reporting to the chairman of the Board of Trustees of S.U.N.Y. his decision to deny tenure to Professor Dube. (A. 807).

Petitioner Wharton waited until the eve of his departure from S.U.N.Y. to announce his decision denying Prof. Dube tenure at Stony Brook. (A. 732).

At the same time that he denied Professor Dube an opportunity to continue teaching at S.U.N.Y. - Stony Brook, where he had been the center of a controversy, petitioner Wharton offered him a salary line and a teaching position at any other campus in the S.U.N.Y.

system where Dube could find a position.
(A. 672).

Petitioner Wharton's denial of tenure to respondent overruled the unanimous recommendations of two of the Chancellor's advisory committees, as well as recommendations of two other peer review committees which supported tenure for Prof. Dube.

It is clear from the documentary and testimonial evidence in this case that the S.U.N.Y. central administration and Board became intimately involved in the "Dube controversy" almost from its inception. Moreover, it can reasonably be inferred from the evidence that the S.U.N.Y. central administration was part of a joint effort to abate what it perceived to be, and what petitioner Marburger explicitly referred to as a "conflagration." (A. 724).

The petitioners were party to, or at the very least aware of, a plan which involved implicit assurances to Jewish organizations lobbying S.U.N.Y. that the University would rid itself of the problem presented by Prof. Dube.

Between 1983 and 1985, petitioners met three or four times with Rabbi Arthur Seltzer of the Anti-Defamation League of B'nai B'rith (A. 758). Rabbi Seltzer's position was that Dr. Dube's teachings were anti-semitic and were far beyond the boundaries of academic investigation. (A. 763a-763b). At the first of these meetings, held in Albany, Rabbi Seltzer asserted that petitioner Marburger had made commitments at a previous meeting to expand community involvement in issues of academic freedom but Seltzer complained of the pace with which this commitment was being fulfilled. (A. 769-770). After a second meeting in

Albany, a meeting was held in New York City, which was also attended by Herbert Gordon and petitioner Marburger. This last meeting, in April, 1984, resulted in an agreement or understanding between the university representative and the A.D.L. The substance of this agreement was that the university would deal with A.D.L.'s concerns through its own internal mechanisms and that the A.D.L. would keep the lowest possible profile. (A. 763e-763h).

This agreement was reached after the Governor and a number of state legislators had communicated publicly and privately their concerns about teachings attributed to Dr. Dube. (A-768; 765-767; 620-626). During the same period, the S.U.N.Y. central administration was attempting to influence the governor and legislature to restore cuts to the S.U.N.Y. budget. One of the legislators who had been critical of the

university's failure to censure Dr. Dube was Assembly member Arthur Kremer, who, as chair of the Ways and Means Committee, had been highly supportive of the university. (A. 622; 738).

The meetings between the university representatives and Rabbi Seltzer, were initiated and attended by State Senator Norman Levy, who also chaired the State Senate Task Force on Vandalism, Religious Desecration and Other Acts of Bigotry. (A. 772). This committee was concerned about whether the State of New York should be spending money on such a course. (A. 753)

On August 30, 1983, the governor of New York denounced the Stony Brook faculty and administration for their failure to repudiate Dr. Dube and the views which were being attributed to him. (A. 50). The next day, at a meeting of the S.U.N.Y. Board of Trustees, petitioner Wharton and Board

Chairman, Donald Blinken, presented to the Board of Trustees a proposed press release, which sought to minimize the significance of the Faculty Senate Executive Committee's inquiry and vindication of Dr. Dube. The press release noted that the action had been taken "in mid-August and therefore in the absence of most of the Stony Brook faculty" and that "it in no way intended to condone or provide support for the content of the faculty member's remarks," which were characterized as a "reprehensible distortion of reality." (A. 679). The minutes of the same meeting of the Board of Trustees reflect that Chairman Blinken was at the time or afterward engaged in negotiations with the Governor's office concerning the dates on which cuts in S.U.N.Y. personnel were to take effect. (A. 787).

In the months that followed, Chairman Blinken raised questions about the academic

value of the African Studies Program at Stony Brook. (A. 697).

During the fall of 1983, the university became the focus of protests, inquiries, and investigations, which demanded that the University account for Prof. Dube and the content of his course on the politics of race. On September 6, 1983, petitioner Marburger issued a statement which was to have been the University's official statement on the controversy. (A. 619; 723).

The September 6th statement was criticized by the A.D.L. in a statement released to the press on September 16, 1983, because it failed to acknowledge "the clear conclusion to be drawn from Dr. Dube's course materials' that racist, anti-Semitic advocacy rather than pedagogy, is the central issue." (A. 703). President Marburger felt that he was in danger of being permanently branded as an anti-Semite.

(A. 725). In a letter to petitioner Marburger dated October 7, 1987, New York State Assembly member Lewis Yevoli stated that he was asking the Chair of the Assembly Ways and Means Committee, Hon. Arthur Kremer, to explore the possibility of defunding African Studies at Stony Brook. Assemblyman Yevoli also stated that he was requesting that Hon. Carl McCall, the New York State Commissioner of Human Rights, investigate whether there had been any violation of the New York State Human Rights law at Stony Brook. (A. 620).

In a letter dated Oct. 18, 1983, Assembly member Kremer wrote to petitioner Marburger, stating that the university had not done enough to disassociate itself from Prof. Dube, and urging that a committee be appointed to examine the racial, ethnic and religious content of courses at Stony Brook. (A. 622). Hon. Carl McCall visited the

S.U.N.Y.-Stony Brook campus in October, 1983. (A. 771).

On October 19, 1983, petitioner Marburger met with representatives of twenty-one local and national Jewish organizations. (A. 706; 798). Following that meeting, petitioner Marburger issued a second statement on the controversy surrounding Dr. Dube's course. This statement absolutely divorced the Stony Brook administration from "the views expressed in [Dr. Dube's] course." (A. 45).

During the fall of 1983, S.U.N.Y. administrators received correspondence from State Senator Leonard Stavisky (A. 625), and State Senator Donald Halperin (A. 626). State Senator Norman Levy's Task Force on Vandalism, Religious Desecration, and Other Acts of Bigotry opened an inquiry of the events at Stony Brook, and heard testimony from both S.U.N.Y. officials in Albany and

members of the Stony Brook administration.
(A. 756-763).

On November 21, 1983, petitioner Marburger issued a statement in which he criticized the Faculty Senate for not conducting a more thorough inquiry of the contents of Professor Dube's course. (A. 50).

In a letter dated October 17, 1983, Congressman Raymond McGrath, wrote to petitioner Marburger, stating his belief that "when the excuse of free thought is used to protect the promotion of hateful ideas, the tenet itself becomes a farce," and that "a university classroom is a most improper forum for any individual to air personal opinions when they infringe upon the freedom and well being of others." (A. 892).

On December 3, 1983, State Senators Donald Halperin and James Lack visited the

Stony Brook campus to meet with petitioners Marburger, Neal and Neville, and with senior faculty members who had been critical of Prof. Dube. (A. 709).

Although petitioner Marburger has since stated that he regarded Prof. Dube as his own best advocate (A. 725), there is no evidence that between the summers of 1983 and 1984, when he was spending "hundreds of hours" addressing the community groups and meeting with community representatives concerning the controversy surrounding Prof. Dube, that he urged any of these groups or individuals to meet directly with Prof. Dube.

Petitioner Marburger testified that "the impression that the community had of what was going on in Professor Dube's course appeared to be very different from what actually went on in the course." (A. 726). Petitioner Marburger also testified that

"while there is no question there were parts of the Jewish community and some people such as Rabbi Arthur Seltzer who were very interested in seeing the University disassociate itself from certain concepts, it was by no means clear to me that those were the concepts that Professor Dube discussed in his course." (A. 726-727).

However, there is nothing which suggests that petitioner Marburger ever attempted to clarify the facts concerning Professor Dube's course in his discussions with the complaining community groups. Rabbi Arthur Seltzer testified that petitioner Marburger never suggested to him that he (Seltzer) was incorrect in his perception of Professor Dube's teaching. (A. 763b).

In responding to the "conflagration," as he characterized it (A. 724), petitioner Marburger turned to his provost, petitioner Neal, and to petitioner Neville, who was

Dean of Humanities and Fine Arts, and who became the dean of Africana Studies in the fall of 1983.

A commission was set up by the University to address the problem of academic freedom as it related to responsible teaching of sensitive and controversial subjects. This extraordinary commission was to establish a procedural mechanism to investigate and respond to charges of academic irresponsibility or violations of the concepts that were imbedded in the policies of the S.U.N.Y. Board of Trustees. (A. 728-730).

At the same time, petitioner Neville chaired a commission which was to organize and promote a campus dialogue on the sensitive issues of racism and anti-Semitism. (A. 26).

Thus, the Stony Brook officials who were directly in the eye of the storm, dealing

with the controversy in 1983 and 1984, were the same individuals who rejected Professor Dube as a tenure candidate in 1985 and 1986. Clearly, these individuals were aware that the same organizations which had led the 1983-84 campaign were continuing to monitor the actions on the Stony Brook campus actions concerning Professor Dube and his course.

In the spring of 1984, the American Jewish Committee forwarded to petitioner Marburger the names of two nominees to a Stony Brook Regional Relations Advisory Council which Marburger was establishing. (A. 775). Dr. Myron Cronitz represented the A.D.L. on that council. (A. 763c).

Rabbi Seltzer of the A.D.L. contacted petitioner Marburger during 1984 to obtain an update on how the University was proceeding on its review of Professor Dube's teaching. (A. 763d). Rabbi Seltzer

telephoned petitioner Marburger in 1984 to ascertain whether the contents of African Studies 319, "The Politics of Race," was the same or different. (A. 763f). Rabbi Seltzer also testified to having had a further meeting with the Stony Brook administration in 1984, to discuss the A.D.L.'s position in light of demonstrations on the Stony Brook campus, and stressed that their "concern with the initial problems that had raised the controversy were still there," but that they "would, under no circumstances, go public again." (A. 763h). Implicit in Rabbi Seltzer's deposition testimony is the concern that the A.D.L. sought to counterbalance the effect of demonstrations by demanding that Professor Dube and his course not be singled out "as an object of potential necessary review." (A. 763h-763i).

Again, while Professor Dube was undergoing tenure review, on August 5, 1985 Rabbi Seltzer wrote to petitioner Marburger to alert him to an interview with Dube which was published in what Seltzer characterized as a "PLO publication." (A. 763i-763j). Also during 1985, the American Jewish Congress' Long Island Council published for distribution on the Stony Brook campus, a document entitled "AFS 319 Supplementary Course Materials," which denounced Professor Dube for "irresponsible anti-Zionist rhetoric." (A. 714).

In mid-1985, when Professor Dube was considered for tenure at Stony Brook, an interdepartmental committee consisting of African Studies Program faculty, and faculty members from other social science disciplines, recommended that Dr. Dube be granted tenure. The committee also recommended that he be promoted to associate

professor. The committee found Dr. Dube to be "an exciting, valuable, and not replaceable resource to African Studies, students, and the University community," and noted that:

[a]ll members of the review committee commented favorably as did several outside referees, on his writing samples and the freshness of their insight and contribution to learning in psychology, African Studies and diplomacy. (A. 627).

Following the peer evaluation process, the reports of the interdepartmental committee and the personnel policy committee, which also recommended tenure for respondent Dube, were transmitted through the Dean of Humanities and Fine Arts, and the Provost, to the President of Stony Brook. The Dean and Provost recommended against tenure, and the President made a

decision to deny tenure to Dr. Dube.
(A. 635-643).

Under Article 33 of the contract between the United University Professors and the State University, tenure decisions may be appealed to the Chancellor of the State University. When an appeal is taken, the professor and the college president select an equal number of members of a review committee, and these in turn select a committee chair. (A. 646-647). In the instant case, Dr. Dube named Dr. Leslie Owens, the chairman of African Studies to the committee. Petitioner Marburger selected Professor Elof A. Carlson, distinguished Professor of Biochemistry. These two appointees then named Professor Aaron W. Godfrey, Lecturer in Classics and

Comparative Literature, to chair the committee. This committee made an independent review of Dr. Dube's qualifications, and unanimously recommended to the Chancellor that Dr. Dube be granted tenure. (A. 650).

Under the policies of the Board of Trustees of S.U.N.Y., evaluations of professors, including tenure evaluations, should be based on "mastery of subject matter," "effectiveness in teaching," "scholarly ability," "effectiveness of university service," and "continuing growth." (A. 670).

The Article 33 committee report described Dr. Dube as "a good teacher, [who] gives a great deal of himself to students on an informal basis, as an advisor, and in

directing independent study and readings." Regarding his mastery of his subject matter, the committee discussed Dr. Dube's ongoing scholarly project on race and racism, and noted that he had inquiries from Columbia University Press concerning the project, and also pointed out that Dr. Dube had served as "a consultant for colleagues in the Department of Psychology who are interested in the application of cognitive psychology to differences in achievement, talent, pace of learning and intelligence." Moreover, the Committee pointed out Dube's "profound influence on his colleagues in the African Studies Program." (A. 653-654).

With respect to Dr. Dube's scholarly ability and continuing

growth, the committee took note of petitioner Neville's admiration for Dr. Dube as a "cultural resource;" the Dean's statement that "few people in the Western world have been involved as he in the affairs of Africa;" and to Dean Neville's references to Dr. Dube as "a walking library and video collection" and "a national treasure." (A. 656). The committee commented:

These are not the remarks one would make of a weak candidate for promotion and tenure. Those candidates who are turned down usually lack national, let alone international, stature. Such candidates are not known for their efforts to shape a more scholarly program or department. They are rarely called upon to give invited talks or asked to participate in international conferences. In Professor Dube's case, we argue, those less tangible contributions, not measured by formal publication, are a valid component of the scholarly contributions a faculty member makes in and

outside the institution. (A. 656).

Concerning Dr. Dube's service to the University, the committee pointed to Dr. Dube's efforts to improve the academic standards of the African Studies Program, and his contribution in helping students perform in accordance with their academic abilities, and in producing courses on African history, African politics, contemporary Africa, and racism. The committee noted that at the time Dr. Dube began with the African Studies Program, "it was not considered a serious discipline and had dubious academic standards." The committee recognized Dr. Dube's accomplishment in changing the image of African Studies through the courses he developed and the initiation of independent reading courses. The

Committee noted that these efforts had increased the range of students participating in African Studies courses as well as the quality of minority students in the program. (A. 656).

The committee also noted that "the controversy surrounding Dr. Dube was, in our view, an important factor for us to consider in the development of his academic career" because "it is not easy for one who has been the victim of oppression in South Africa to ignore the potential for violence and intimidation even in our own country.." The committee pointed out that Dr. Dube had been required to do "a considerable amount of academic retooling" to meet the needs of African Studies, and that the fact that African Studies was an

undergraduate degree-granting unit with no graduate degree program made it difficult to do post-graduate work. The committee expressed confidence that once the anxiety of tenure was removed, Dr. Dube could be more productive as a writer while continuing his impressive record of external lecturing and of teaching and service to the university and its students. (A. 657).

The second Article 33 committee, consisting of Professor Dana Bramel, selected by Dr. Dube; Professor Edward Ames, selected by President Marburger; and chaired by Professor Thomas T. Liao, met during the months of October and November, 1986. The committee report noted that Dr. Dube had published a third scholarly article in "The Philosophical

Review." Like the first three peer committees which had reviewed Dr. Dube's qualifications, this committee recommended that Dr. Dube be granted tenure. Like the first tripartite committee, the second tripartite committee was unanimous in its recommendation. The second committee proposed to the chancellor that if he found Dr. Dube's record of publications inadequate, in the alternative his contract should be extended three years, to allow him a period free of turmoil to show his ability to publish. (A. 668).

In addition to the support for tenure of the four peer review committees which evaluated Professor Dube's candidacy, the university was urged to grant Professor Dube tenure by Dr. Thomas Karis, the executive

officer of the City University of New York Ph.D. program in Political Science. Dr. Karis's letter urged tenure for Professor Dube in the strongest terms. Dr. Karis described his own extensive background as a professional and as a scholar in the area of South African politics, and stated of Professor Dube, that "[a] scholar with his experience has a professional obligation to engage in vigorous discussions of the ramifications of his specialty and its implications for policy." Dr. Karis further praised Professor Dube for "the range of his interests and, more important, the underlying coherence." (A. 694)

Professor Dana Bramel impressed upon the university the significance

of Dr. Dube's scholarship as a psychologist. (A. 662).

Professor Michael Zweig, writing in his capacity as President of the Arts and Sciences Senate, warned that the flouting of the peer review process in Professor Dube's case would destroy S.U.N.Y.-Stony Brook's credibility as a home for Black scholars. (A. 659).

The African Studies Advisory Committee's Chair, Professor John A. Williams, warned that denial of tenure to Professor Dube would be a crippling blow to the African Studies Program. (A. 660).

In view of the extraordinary tension which the university had experienced in 1983 and 1984, the university's response to this pressure, and the strength of the

recommendations for Dr. Dube made by his peers within African Studies throughout the review process, and by his colleagues within and outside the university, there is certainly evidence from which a jury could reasonably discredit petitioners' self-serving claims that their decision to deny tenure to Professor Dube was motivated by his lack of scholarship.

The above facts have been culled from a 900 page record which was before the Second Circuit and surely demonstrate that the Circuit Court's conclusion that the evidence submitted was sufficient to get to a jury was proper.

The Second Circuit also properly found that the right which Dube alleged was violated was "long standing and clearly established" under First Amendment law. Pet. at 27a. This conclusion was reached after a discussion of the relevant cases as decided by this Court dating back to 1957. Again, the Second Circuit opinion is consistent with the qualified immunity analysis propounded by this Court and should be upheld.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

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